In the Supreme Court of the United States

OCTOBER TERM, 1969

No. ———

GEORGE K. ROSENBERG, DISTRICT DIRECTOR,
PETITIONER

v.

YEE CHIEN WOO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the District Director of the Immigration and Naturalization Service, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on December 18, 1969.

OPINION BELOW

The opinion of the court of appeals (Appendix A, *infra*, pp. 9-13) is reported at 419 F.2d 252.

JURISDICTION

The judgment of the court of appeals (Appendix B, *infra*, p. 14) was entered on December 18, 1969. On

March 23, 1970, Mr. Justice Douglas extended the time for filing a petition for writ of certiorari to and including May 16, 1970. This court has jurisdiction under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an alien refugee from the mainland of China who fled to Hong Kong in 1953, and thereafter lived in Hong Kong for approximately seven years, is entitled to immigration benefits as a refugee under Section 203(a)(7) of the Immigration and Nationality Act.

STATUTE INVOLVED

Section 203(a)(7) of the Immigration and Nationality Act, as added, 79 Stat. 913, 8 U.S.C. (Supp. IV) 1153(a)(7), provides as follows:

> Conditional entries shall next be made available by the Attorney General, pursuant to such regulations as he may prescribe and in a number not to exceed 6 per centum of the number specified in section 201(a)(ii), to aliens who satisfy an Immigration and Naturalization Service officer at an examination in any non-Communist or non-Communist-dominated country, (A) that (i) because of persecution or fear of persecution on account of race, religion, or political opinion they have fled (I) from any Communist or Communist-dominated country or area, or (II) from any country within the general area of the Middle East, and (ii) are unable or unwilling to return to such country or area on account of race, religion, or political opinion, and (iii) are

not nationals of the countries or areas in which their application for conditional entry is made; or (B) that they are persons uprooted by catastrophic natural calamity as defined by the President who are unable to return to their usual place of abode. For the purpose of the foregoing the term "general area of the Middle East" means the area between and including (1) Libya on the west, (2) Turkey on the north, (3) Pakistan on the east, and (4) Saudi Arabia and Ethiopia on the south: *Provided*, That immigrant visas in a number not exceeding one-half the number specified in this paragraph may be made available, in lieu of conditional entries of a like number, to such aliens who have been continuously physically present in the United States for a period of at least two years prior to application for adjustment of status.

STATEMENT

Respondent is a native and citizen of China who left Communist China in 1953 and has never returned there. He then went to Hong Kong and was married there the same year. He continued to reside with his wife in Hong Kong until 1960, and a child was born to them in Hong Kong.

In 1960, respondent came to the United States as a temporary visitor for business. His temporary stay expired in 1966 but he remained unlawfully in the United States. His wife and child in the meantime came to the United States in 1965 as temporary visitors and likewise overstayed their temporary period of admission. A joint deportation hearing against

respondent and his wife resulted in an order for their deportation in 1966.

Respondent then applied for refugee status under Section 203(a)(7) of the Immigration and Nationality Act, as added, 8 U.S.C. 1153(a)(7), which would have permitted him to remain in the United States permanently. Petitioner denied the application and certified the case to the regional commissioner for review. In 1967, the regional commissioner affirmed the denial of the application, finding that although respondent was once a refugee, he had lost that status when he became a resident of a third country. The regional commissioner found that respondent had been given residence privileges in Hong Kong and had occupied an apartment there with his family; that he had operated a business in Hong Kong until 1960; that he had a document entitling him to return to that country, and that respondent admittedly would be permitted to resume his residence and re-establish his business in Hong Kong.

Respondent then brought a suit in the district court to review the denial of his application for refugee status. The district court ruled in his favor, finding that he had not become firmly settled in Hong Kong. 295 F.Supp. 1370. On appeal the Court of Appeals for the Ninth Circuit affirmed, holding that it was irrelevant, for purposes of Section 203(a)(7), whether respondent was firmly resettled in Hong Kong, since it read that statute as granting benefits to a refugee from the country of his nationality, even though he was granted residence privileges in a third country. 419 F.2d 252.

REASONS FOR GRANTING THE WRIT

1. It is clear that respondent was a refugee from mainland China in 1953. Thereafter, however, he was granted stable residence rights in a third country to which he can now return. Our contention is that he can no longer claim refugee status.

As the court below pointed out, earlier refugee statutes specifically precluded benefits to refugees who had been firmly resettled elsewhere, and the present statute has omitted that specific preclusion. However, the legislative history indicates that when Congress established the conditional entry dispensation for refugees in 1965, it did not intend to change previous criteria under which refugees were admitted to the United States on parole. See S. Rep. 748 (pp. 16-17), H. Rep. 745 (pp. 15-16), 89th Cong., 1st Sess. Moreover, the interpretation of the court below overlooks that Section 203(a)(7) was intended to give special benefits to refugees who could not return to their homes because they feared persecution there. In our view, it was not intended to benefit those who were once refugees but who had since established stable homes to which they could now return. When he came to the United States as a visitor in 1960, petitioner's home was in Hong Kong, where he admittedly still is welcome as a resident and businessman. Therefore we believe he is not entitled to benefits as a refugee under Section 203(a)(7).

2. Only a maximum of 10,200 refugees can be admitted each year as conditional entrants under Section 203(a)(7). This small allotment is reserved

for those who have no homes to which they can return, since they face persecution if they return to their homes. By authorizing use of this category for persons who no longer are actually refugees, the court below makes possible the shutting off of asylum opportunities for other persons who are now homeless. The issue in this case is thus of wide importance, and affects a considerable number of cases pending in the administrative and judicial processes. Several district courts have come to conclusions contrary to that expressed by the court below.

An appeal from one such decision was argued before the United States Court of Appeals for the Second Circuit on February 26, 1970, and is awaiting decision by that court. *Peter Chow Lung Shen* v. *Esperdy*, No. 34212. Because of the pendency of the *Shen* case in the Second Circuit, we sought and obtained an extension of time to petition for certiorari. But no decision has yet been rendered and our time is about to expire. This petition is accordingly filed in order to preserve the issue in the event there is a conflict of circuits. We shall advise the Court when the *Shen* case is decided.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

CHARLES GORDON,
General Counsel,
Immigration and Naturalization Service.

MAY 1970.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 24,334

YEE CHIEN WOO, PLAINTIFF-APPELLEE

v.

GEORGE K. ROSENBERG, District Director, Immigration and Naturalization Service, DEFENDANT-APPELLANT

On Appeal from the United States District Court for the Southern District of California

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Before: MERRILL and TRASK, Circuit Judges, and BYRNE, District Judge *

MERRILL, Circuit Judge:

This appeal presents the question whether an alien, otherwise entitled as a refugee to "Seventh Preference" treatment under § 203(a)(7) of the Immigration and Nationality Act,[1] may be denied such treatment on the ground that he had become firmly resettled elsewhere and that his entry into the United States was not therefore emergent.

Appellee is a native of Shanghai, China. In 1952 his substantial business and financial holdings were

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* Hon. William M. Byrne, United States District Judge for the District of Central California, sitting by designation.

confiscated by the Communist Government. He sought and was granted permission to leave Communist China for a foreign visit with the understanding that he would return. In 1953 he went to Hong Kong and has never returned to Communist China.

In Hong Kong he started a business under the name of Harry Woo Trading Company, taking orders for merchandise and clothing. He was married and a son was born. In 1959 he was admitted to the United States temporarily as a visitor for business purposes, to operate a concession at the International World's Fair in Portland, Oregon. He returned to Hong Kong later that year. On May 22, 1960, he made his second entry into the United States as a business visitor in connection with the San Diego Fair and International Trade Mart. He has never since left the United States. His temporary stay expired March, 1966. By this time he had been joined by his wife and child, who had entered Canada and had been admitted to the United States from Canada as visitors for pleasure. Deportation proceedings were commenced upon his failure to depart. On March 8, 1966, he and his family were granted voluntary departure. They failed to depart. Also on March 8, 1966, appellee applied for classification as a refugee under § 203(a)(7). He has expressed opposition to communism and believes that should he return to Communist China he would be persecuted as a member of the capitalist class. However, he possesses a valid Hong Kong Certificate of Identity which is sufficient documentation to permit his return to Hong Kong. His application was denied by the District Director, Los Angeles, and that decision was affirmed by the Regional Commissioner, San Pedro, California. The Regional Commissioner held that "Congress did not intend that an alien, though formerly a refugee, who had established roots or ac-

quired a residence in a country other than the one from which he fled would again be considered a refugee for the purpose of gaining entry into and or subsequently acquiring status as a resident in this, the third country," citing *Matter of Sun*, 12 I&N Dec. 36 (1966). The Regional Commissioner concluded that appellee is in possession of a document that permits him to return and reside in Hong Kong; consequently, that he had not established his inability to return to *Hong Kong*, or that he is unable to return thereto on account of race, religion or political opinion.

Upon denial of his application appellee brought the instant suit for declaratory judgment under 28 U.S.C. § 201. The District Court ruled that he was entitled on the facts to the benefits of § 203(a)(7), regardless of the applicability of the "firmly resettled" criterion. The Service has taken this appeal.

We hold that § 203(a)(7) does not require, as a condition precedent to conditional entry, that the alien be "not firmly resettled elsewhere."

The nature of the relationship of the refugee to an intermediate host country to which he has fled from his home country and in which he has found temporary asylum is a necessary consideration under this and prior refugee relief acts.

In the Displaced Persons Act of June 25, 1948 (62 Stat. 1009), Congress excluded those who, after fleeing from their home countries, had been received for "permanent residence" elsewhere. In the Refugee Relief Act of August 7, 1953 (67 Stat. 400), Congress included as a condition precedent the fact that the refugee was "not firmly resettled" elsewhere. In the Refugee Act of September 11, 1957 (71 Stat. 639), however, these words were omitted and the phrase "not a national" (of the intermediate country) was substituted. This substituted language was repeated

in the Fair Share Refugee Act of July 14, 1960 (74 Stat. 504-5), and also in the Refugee Assistance Act of June 28, 1962 (76 Stat. 121). It was repeated again in the act now before us.

Whether appellee was firmly resettled in Hong Kong is not, then, relevant. What is relevant is that he is not a national of Hong Kong (or the United Kingdom); that he is a national of no country but Communist China and as a refugee from that country remains stateless.

The Service insists that Congress cannot have intended that "once a refugee always a refugee"; that this "literally would make thousands upon thousands of aliens, formerly refugees and now firmly resettled in host countries eligible to apply for conditional entry." But Congress appears to have met this possibility by specifically limiting the number of those who can claim conditional entry under the "Seventh Preference." In any event we cannot disregard the clear manifestation of congressional intent shown by the substitution, in 1957, of the status "not a national" for that of "not firmly resettled" as formerly specified in the 1953 Act. Nothing in the legislative history advanced by appellant persuades us that Congress intended this substituted language to mean anything but what it clearly says. See *United States* v. *Public Utilities Comm'n*, 345 U.S. 295, 315 (1953); *United States* v. *Rice*, 327 U.S. 742, 752-53 (1946).

Judgment affirmed.

FOOTNOTES

1. (*Page 1*) 8 U.S.C. § 1153(a)(7) added to the Immigration and Nationality Act by the Act of October 3, 1965 (79 Stat. 911), reads as follows:

"Aliens, who are subject to the numerical limitations specified in section 1151(a) of this title shall be allotted visas or their conditional entry authorized, as the case may be, as follows:

* * * *

(7) Conditional entries shall next be made available by the Attorney General, pursuant to such regulations as he may prescribe and in a number not to exceed 6 per centum of the number specified in section 1151(a)(ii) of this title, to aliens who satisfy an Immigration and Naturalization Service officer at an examination in any non-Communist or non-Communist-dominated country, (A) that (i) because of persecution or fear of persecution on account of race, religion, or political opinion they have fled (I) from any Communist or Communist-dominated country or area * * * and (ii) are unable or unwilling to return to such country or area on account of race, religion, or political opinion, and (iii) are not nationals of the countries or areas in which their application for conditional entry is made; or (B) that they are persons uprooted by catastrophic natural calamity as defined by the President who are unable to return to their usual place of abode * * * *Provided*, That immigrant visas in a number not exceeding one-half the number specified in this paragraph may be made available, in lieu of conditional entries of a like number, to such aliens who have been continuously physically present in the United States for a period of at least two years prior to application for adjustment of status."

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 24334

YEE CHIEN WOO, PLAINTIFF-APPELLEE

vs.

GEORGE K. ROSENBERG, District Director, Immigration and Naturalization Service, DEFENDANT-APPELLANT

APPEAL from the United States District Court for the Southern District of California.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered Dec. 18, 1969

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